No. 29

In the Supreme Court of the United States

OCTOBER TERM, 1960

GIACOMO REINA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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INDEX

CITATIONS

563201—60——1

Constitution and Statutes—Continued

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OPINION BELOW

The opinion of the court of appeals (R. 38–40) is reported at 273 F. 2d 234.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1959 (R. 40). The petition for a writ of certiorari was filed on January 27, 1960, and was granted on April 4, 1960 (R. 41). 362 U.S. 939. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1406, which permits the Federal Government, upon granting immunity from pros-

ecution, to compel incriminating testimony concerning violations of federal narcotic laws, violates the federal constitutional prohibition against compulsory self-incrimination.

2. Whether, as a condition to requiring petitioner to testify pursuant to such immunity, the Government was required to pardon him for a previous narcotic conviction for which he was then serving his sentence.

3. Whether petitioner's conviction of contempt for refusal to testify before a grand jury, after he had been given the aforesaid statutory immunity, was invalid because the trial court did not advise him of the extent of such immunity.

4. Whether the sentence of two years' imprisonment was excessive.

STATUTE INVOLVED

18 U.S.C. 1406:

> Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of—
>
> (1) any provision of part I or part II or subchapter A of chapter 39 of the Internal Revenue Code of 1954 the penalty for which is provided in subsection (a) or (b) of section 7237 of such Code,
>
> (2) subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U.S.C., sec. 174), or

(3) the Act of July 11, 1941, as amended (21 U.S.C., sec. 184a),

is necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.

STATEMENT

Petitioner was convicted of contempt for refusal to answer questions before a federal grand jury that was investigating possible violations of federal narcotic laws, after he had been granted immunity from prosecution (R. 36-37). He was sentenced to two years' imprisonment, the sentence to be vacated if within 60

days he purged himself by answering the questions (R. 34, 37). The court of appeals unanimously affirmed the conviction (R. 38–40).

On December 5, 1958, petitioner, pursuant to a subpoena, appeared before a federal grand jury sitting in the Southern District of New York (R. 30). Petitioner was then serving a five-year sentence for a federal narcotic offense (R. 15; *United States* v. *Reina*, 242 F. 2d 302 (C.A. 2), certiorari denied *sub nom. Moccio* v. *United States*, 354 U.S. 913). Petitioner was asked a number of questions with respect to narcotics (R. 2–7), which he refused to answer on the ground of self-incrimination (R. 30). In accordance with the provisions of 18 U.S.C. 1406 (*supra*, pp. 2–3), the Attorney General authorized the United States Attorney to seek a court order directing petitioner to testify and produce evidence before the grand jury (R. 910, 30). The district court entered such an order (R. 10–11), the effect of which was to grant petitioner immunity from prosecution, penalty, or forfeiture with respect to any matter about which he was compelled to testify following his claim of self-incrimination.

When petitioner again appeared before the grand jury, he refused to answer the questions (R. 15–16, 30). An order to show cause why petitioner should not be punished for contempt was then issued (R. 12–13).

At the hearing on the order (R. 14–29), petitioner contended that 18 U.S.C. 1406 is unconstitutional under the Fifth and Fourteenth Amendments because it allegedly does not confer immunity from state

prosecution (R. 21–22).[1] The district court upheld the constitutionality of the statute on the ground that testimony may constitutionally be compelled by the Federal Government upon a grant of immunity from federal prosecution, "whether or not the testimony would be incriminating under the laws of another jurisdiction" (R. 32). It ruled (R. 33–34) that, in view of the immunity conferred, petitioner could constitutionally be required to testify before the grand jury, and that his refusal to do so constituted contempt. The court directed that petitioner be imprisoned for two years, to commence at the expiration of the sentence he was then serving (R. 34–37).[2] However, recognizing that petitioner's refusal to answer the questions "when first addressed to him may have been a procedural device to secure a determination of the issue of law which he presented," the court provided that if within 60 days petitioner "purge[s] himself of his contempt by answering the questions which have been addressed to him by the Grand Jury * * * the sentence imposed herein will be vacated" (R. 34–37).

SUMMARY OF ARGUMENT

The principal issue in this case is whether the immunity provision of the Narcotic Control Act of 1956 (18 U.S.C. 1406) violates the federal constitutional prohibition against compulsory self-incrimination.

[1] Although petitioner initially contended that some of the questions asked were outside of the scope of the statute (R. 20–21), he subsequently abandoned that contention (R. 24).

[2] The district court granted petitioner bail in the instant case. By order of February 1, 1960, Mr. Justice Harlan continued petitioner on bail pending the final disposition of the case by this Court.

The court of appeals, relying upon *United States* v. *Murdock,* 284 U.S. 141, held the provision constitutional on the ground that incriminating testimony may be compelled by the Federal Government if it grants immunity from federal, although not from state, prosecution. We agree with that position. We also believe, however, that the decision below may be sustained on the alternative ground that Section 1406 also confers immunity from state prosecution, and that such grant of state immunity is constitutional. Accordingly, in our view there is no occasion for this Court to consider petitioner's contention that *Murdock* should be reexamined and overruled.

I

A. Section 1406 provides that no witness compelled thereunder to testify with respect to possible violations of federal narcotic laws "shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled * * * to testify * * *, nor shall testimony so compelled be used as evidence in any criminal proceeding [except prosecution for perjury or contempt committed while giving compelled testimony] against him in any court." On its face, this broad grant of immunity from prosecution or "any" penalty or forfeiture, on account of "any" matter with respect to which testimony is compelled, covers all criminal proceedings, state as well as federal. "The act in question contains no suggestion that it is to be applied only to the Federal courts" (*Brown* v. *Walker,* 161 U.S. 591, 607).

Section 1406 contains virtually the same language as the Immunity Act of 1954 (18 U.S.C. 3486(c)), dealing with national security. In *Ullmann* v. *United States,* 350 U.S. 422, this Court held that the latter Act grants immunity from state as well as from federal prosecution. It relied upon the legislative history of the 1954 Act which stated (H. Rep. No. 2606, 83d Cong., 2d Sess., p. 7) that the language "is sufficiently broad to ban a subsequent State prosecution * * *." The Court in *Ullmann* also relied upon *Brown* v. *Walker,* 161 U.S. 591, where a similar prohibition against prosecution granted by the Immunity Act of February 11, 1893, 27 Stat. 443, for compelled testimony before the Interstate Commerce Commission, was held to "grant protection against prosecution in the state courts" (350 U.S. at 434).

The 1956 Act here involved was enacted approximately four months after the *Ullmann* decision. In light of the *Brown* holding that a similar broad grant of immunity covered state prosecution, the legislative history showing that Congress intended to confer state immunity in the 1954 Act, and the use of virtually the same language in the 1956 Act as was used in the 1954 Act, we submit that the 1956 Act, like its predecessor, grants state, as well as federal, immunity.

B. 1. *Ullmann* v. *United States, supra,* also held that the federal grant of state immunity in the 1954 Act is constitutional. The rationale was that Congress was acting within the scope of its constitutional power to provide for the national defense, and that the grant of immunity from state prosecution was "necessary and proper for carrying into Execution"

such "conceded federal power" (350 U.S. at 436).

Federal narcotic legislation rests on just as clear "conceded federal power" as the national security legislation involved in *Ullmann*. The federal authority over narcotics does not rest solely on the taxing power, as petitioner apparently suggests, but also on the commerce and treaty powers. Indeed, control of import of narcotics—a matter of exclusive and explicit federal power—is the basic pillar of all federal narcotic legislation, without which effective regulation would be virtually impossible. In these circumstances, no valid distinction can be made between *Ullmann* and this case on the ground that *Ullmann* involved national defense and this case involves narcotics.

2. The grant of state immunity in Section 1406 is just as "necessary and proper for carrying into Execution" the broad Congressional authority over narcotics as the immunity provision for national security cases sustained in *Ullmann*. As this Court long ago recognized (*Nigro* v. *United States*, 276 U.S. 332, 343–344), and as the legislative history of the Narcotic Control Act of 1956 shows, the ease with which narcotics can be concealed and the clandestine character of the traffic make it essential that there be effective enforcement powers. Section 1406 "reflects a congressional policy to increase the possibility of more complete and open disclosure by removal of fear of state prosecution" (see *Ullmann*, *supra*, at 436); it was one of several provisions which Congress included in order to permit en-

forcement officers to operate more effectively (H. Rep. No. 2388, 84th Cong., 2d Sess., p. 10). Here, as in *Ullmann*, there is no broad-scale or general supersession of state law. State immunity is conferred only in those cases where the Attorney General and the United States Attorney determine that the testimony of a particular witness is "necessary to the public interest," and that he should therefore be immunized from state prosecution in order to enable the Federal Government to obtain evidence that would otherwise be unavailable.

3. The fact that, despite the extensive federal narcotic regulation, the states still retain substantial authority in this field does not invalidate the federal grant of state immunity for particular cases. For federal power, otherwise validly exercised, is not invalid because "the same business may be regulated by the police power of the State" (*United States* v. *Doremus*, 249 U.S. 86, 94). And, once it be established that the federal legislation is within the power of Congress (as is the case here), it is the "supreme Law of the Land" to which any inconsistent state law must bow. See *Adams* v. *Maryland*, 347 U.S. 179, 183.

II

If the Court should reject our contention that 18 U.S.C. 1406 constitutionally confers immunity from both state and federal prosecution, it would then have to consider petitioner's contention that *United States* v. *Murdock*, 284 U.S. 141, should be overruled and that the Court should adopt the rule that the Federal

Government can compel incriminating testimony only by conferring immunity from both state and federal prosecution. If the Court finds it necessary to reach this question, we submit that the unanimous decision in *Murdock* that the Fifth Amendment protects only against prosecution under federal law is correct and should be reaffirmed.

The basic rationale of *Murdock* is that under our federal system "full and complete *immunity against prosecution by the government compelling the witness to answer* is equivalent to the protection furnished by the rule against compulsory self-incrimination" (284 U.S. at 149; emphasis added). The same rationale—that the Fifth Amendment "protect[s] only against invasion of civil liberties by the Government whose conduct [it] alone limit[s]"—was reasserted in *Feldman* v. *United States*, 322 U.S. 487, 489, and, more recently, in *Knapp* v. *Schweitzer*, 357 U.S. 371, 380.

Petitioner attacks *Murdock* on the ground that the Court there misinterpreted two English cases upon which it relied. The decision in *Murdock*, however, basically rested on the inherent character of our federal system, not the English precedents; the Court also relied upon four of its own leading cases involving the scope of the privilege against self-incrimination. Petitioner also contends that it is unfair to permit the states to prosecute for crimes disclosed in testimony compelled by the Federal Government. This claim, however, is not a valid basis for extending the federal constitutional privilege to an area that it was never intended to reach. Any possible unfair-

ness can be dealt with by reciprocal federal and state legislation.

III

The three other grounds upon which petitioner challenges his conviction of contempt are without merit.

A. The Government was not required, as a condition to requiring petitioner to testify pursuant to the grant of immunity, to pardon him for a prior narcotic conviction for which he was then serving his sentence. The constitutional privilege against self-incrimination is designed solely to protect a witness against future prosecution; it was never intended to, and does not, exonerate for past convictions. Section 1406 gives petitioner full protection against future prosecution.

B. Petitioner's conviction of contempt was not rendered invalid by the fact that the trial court did not advise him of the extent of immunity under the Act. Although sentencing petitioner to two years' imprisonment, the trial court gave him sixty days within which to purge himself by answering the questions. We construe the purge period as running from the date of final disposition of this case, including the action of this Court. Petitioner plainly can suffer no prejudice from the fact that the trial court did not advise him of the extent of his immunity. For after this Court determines the extent of that immunity, petitioner will have ample time within which to make an informed choice between answering the questions and going to jail.

But whatever the effect of the purge provision, petitioner's refusal to testify was nevertheless contemptuous. Petitioner was represented by counsel in the contempt proceedings; the court could not alter the scope of the immunity, which was fixed by Congress; the court in no way misled petitioner as to his immunity; and petitioner did not request advice from the court on that issue. In these circumstances, the court was not required to explain to petitioner, prior to directing him to answer, its view as to the scope of the immunity.

C. The sentence of two years' imprisonment was not an abuse of the district court's discretion. The fact that petitioner was then serving a five-year sentence for a prior narcotic conviction is immaterial. The two sentences were for entirely different offenses: the prior sentence was for conspiracy to violate the narcotic laws, and the instant sentence was for the contemptuous refusal to give testimony as directed by the court. Comparable sentences have been upheld in other narcotic contempt cases based on refusal to testify following the granting of immunity under 18 U.S.C. 1406.

ARGUMENT

The principal issue in this case is whether the immunity provision of the Narcotic Control Act of 1956 (18 U.S.C. 1406) violates the federal constitutional prohibition against compulsory self-incrimination. The statutory provision authorizes the Federal Government to compel incriminating tes-

timony and evidence in narcotics cases, but grants immunity with respect to matters thereby disclosed. For more than 60 years, it has been settled that incriminating testimony may be compelled if the witness is given immunity from prosecution that is coextensive with the privilege against self-incrimination. *Counselman* v. *Hitchcock,* 142 U.S. 547; *Brown* v. *Walker,* 161 U.S. 591; *Hale* v. *Henkel,* 201 U.S. 43; *Ullmann* v. *United States,* 350 U.S. 422, 429–431. The constitutional validity of 18 U.S.C. 1406 accordingly turns on whether the immunity therein conferred is as broad as the privilege.

The court of appeals, relying upon *United States* v. *Murdock,* 284 U.S. 141, held the provision constitutional on the ground that incriminating testimony may be compelled by the Federal Government if it grant immunity from federal, although not from state, prosecution. Petitioner urges this Court to reexamine and overrule *Murdock.* We believe, however, that the decision below may be sustained on the alternative ground that Section 1406 confers immunity from state, as well as federal, prosecution, and that the grant of state immunity is constitutional. Accordingly, there is no occasion for this Court to reexamine *Murdock.* But we shall further argue that, if *Murdock* is to be reexamined, it is correct and should be reaffirmed. Finally, we shall show that none of the other grounds upon which petitioner challenges his corrupt conviction has merit.

I

18 U.S.C. 1406 CONSTITUTIONALLY CONFERS IMMUNITY FROM BOTH STATE AND FEDERAL PROSECUTION

A. THE IMMUNITY EXTENDS TO STATE PROSECUTION

Section 1406 (*supra*, pp. 2–3) provides that no witness compelled thereunder to testify with respect to possible violations of federal narcotic laws

> shall be *prosecuted* or subjected to *any* penalty or forfeiture for or on account of *any transaction, matter, or thing* concerning which he is compelled * * * to testify or produce evidence, nor shall testimony so compelled be used as evidence *in any criminal proceeding* (except prosecution described in the next sentence) against him *in any court.* No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section [emphasis added].

On its face, this broad grant of immunity from prosecution or "any" penalty or forfeiture, on account of "any" matter with respect to which testimony is compelled, covers all criminal proceedings, state as well as federal. As this Court stated, in holding that the statutory prohibition upon the use "in any criminal proceeding * * * in any court" of testimony given before a Congressional committee (18 U.S.C. 3486(a)(2)) covers both state and federal courts, "[l]anguage could be no plainer" (*Adams* v. *Maryland*, 347 U.S. 179, 181). "The act in question contains no suggestion that it is to be applied only to the

Federal courts" (*Brown* v. *Walker*, 161 U.S. 591, 607).[3]

The only limitation upon this broad immunity is that provided by the statute itself, namely, the immunity does not extend to prosecutions for perjury or contempt committed while giving the compelled testimony or producing the compelled evidence. Had Congress intended further to limit the immunity to federal prosecutions, it presumably would have specifically so provided—as it did in the Mann Act (36 Stat. 826, as amended, 18 U.S.C. 2424(b)), upon which petitioner relies (Br. 13), where it granted immunity only from prosecution, penalty or forfeiture "under any law of the United States." See *infra*, n. 10, p. 27.

The language of the Immunity Act of 1954 (18 U.S.C. 3486(c)) is virtually identical to Section 1406, except that it deals with national security rather than narcotics. In *Ullmann* v. *United States*, 350 U.S. 422, this Court held that the 1954 Act grants immunity from state as well as from federal prosecution. The Court quoted (350 U.S. at 435) the following passage from the House Judiciary Committee Report on the 1954 Act (H. Rep. No. 2606, 83d Cong., 2d Sess., p. 7,

[3] In *Tedesco* v. *United States*, 255 F. 2d 35, 39 (C.A. 6), the court, although questioning, but not deciding, the power of Congress to grant immunity from state narcotic prosecutions (but see *infra*, pp. 18–28, where we show that Congress has such power), concluded that 18 U.S.C. 1406 "clearly undertakes to grant state as well as federal immunity." In *United States* v. *Pagano*, 171 F. Supp. 435, 438, n. 1 (S.D. N.Y.), the court stated: "There is no doubt that the statute * * * on its face purports to grant immunity from state prosecutions." Cf. also *Corona* v. *United States*, 250 F. 2d 578, 579 (C.A. 6), certiorari denied, 356 U.S. 954.

emphasis added) as "support[ing] the broad interpretation of the Act before us":

> Even though the power of Congress to prohibit a subsequent State prosecution is doubtful, such a constitutional question should not prevent the enactment of the recommended bill.[4] *The language of the amendment * * * is sufficiently broad to ban a subsequent State prosecution* if it be determined that the Congress has the constitutional power to do so. In addition, the amendment recommended provides the additional protection—as set forth in the Adams case, by outlawing the subsequent use of the compelled testimony in any criminal proceeding—State or Federal.
>
> By the use of these two distinct concepts, the committee believes that the fullest protection that can be afforded the witness will be achieved.

The Court in *Ullmann* also relied upon *Brown* v. *Walker,* 161 U.S. 591. There, it was pointed out (350 U.S. at 434), a similar "prohibition against prosecution" granted by the Immunity Act of February 11, 1893, 27 Stat. 443, for compelled testimony before the Interstate Commerce Commission, was held to "grant protection against prosecution in the state courts." *Ullmann* quoted (350 U.S. at 434–435) the following language from the *Brown* opinion (161 U.S. at 607–608, italics in original):

> The act in question contains no suggestion that it is to be applied only to the Federal courts.

[4] The Court further held that this grant of immunity from state prosecution is constitutional (350 U.S. at 435–436). As we show *infra* (pp. 18–28), this holding in *Ullmann* is also applicable to the statute involved in the instant case.

> It declares broadly that "no person shall be excused from attending and testifying * * * before the Interstate Commerce Commission * * * on the ground * * * that the testimony * * * required of him may tend to incriminate him," etc. "But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify," etc. It is not that he shall not be prosecuted for or on account of any *crime* concerning which he may testify, which might possibly be urged to apply only to crimes under the Federal law and not to crimes * * * also cognizable under state laws; but the immunity extends to any *transaction, matter or thing* concerning which he may testify, which clearly indicates that the immunity is intended to be general, and to be applicable whenever and in whatever court such prosecution may be had.

The 1956 Act (here involved) was enacted on July 18, 1956, approximately four months after the *Ullmann* decision. In the light of the *Brown* holding that a similar broad grant of immunity covered state prosecution, the clear legislative history that Congress intended to confer state immunity in the 1954 Act, and the use of virtually the same language in the 1956 Act as was used in the 1954 Act, we do not think it is significant that the legislative history of the 1956 Act fails specifically to deal with the question whether state immunity was provided. In the absence of any affirmative indication that Congress did not intend the 1956 immunity provision to have the same scope as the

1954 Act, we submit that the 1956 Act, like its predecessor, grants state, as well as federal, immunity.

B. THE GRANT OF IMMUNITY FROM STATE PROSECUTION IS CONSTITUTIONAL

Ullmann v. *United States, supra,* held not only that the immunity provided by the 1954 Act extends to state prosecution, but that the federal grant of such state immunity is constitutional. Petitioner attempts (Br. 13–19) to distinguish *Ullmann* on the ground that the authority of Congress to grant state immunity was rested on the "paramount" "power of the Federal Government to provide for the National defense" (Br. 13); but that Congress has no comparable power "to legislate immunity concerning violation of state narcotics laws, a subject that has traditionally been within the police power of the state and which is protected by the Tenth Amendment (Br. 19). This argument is based upon a misconception of the rationale of *Ullmann.*

1. In rejecting Ullmann's challenge to "the constitutional power of Congress to grant immunity from state prosecution" (350 U.S. at 435), the Court stated (p. 436):

> [I]t cannot be contested that Congress has power to provide for national defense and the complementary power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const., Art. I, § 8, cl. 18. The Immunity Act is concerned with the national security. It

> reflects a congressional policy to increase the possibility of more complete and open disclosure by removal of fear of state prosecution. We cannot say that Congress' paramount authority in safeguarding national security does not justify the restriction it has placed on the exercise of state power for the more effective exercise of conceded federal power. We have already, in the name of the Commerce Clause, upheld a similar restriction on state court jurisdiction, *Brown* v. *Walker,* 161 U.S., at 606–607, and we can find no distinction between the reach of congressional power with respect to commerce and its power with respect to national security. See also *Hines* v. *Davidowitz*, 312 U.S. 52.

Substantially the same rationale had been applied two years earlier in *Adams* v. *Maryland,* 347 U.S. 179, which upheld the power of Congress to preclude the states from using testimony that is compelled before a Congressional investigating committee. This Coourt there pointed out (p. 183) that "Congress has power to summon witnesses before either House or before their committees"; that "Article I of the Constitution permits Congress to pass laws 'necessary and proper' to carry into effect its power to get testimony"; that the Court was "unable to say that the means Congress has here adopted to induce witnesses to testify is not 'appropriate' and 'plainly adapted to that end' "; and that "since Congress in the legitimate exercise of its powers enacts 'the supreme Law of the Land,' state courts are bound by [the immunity provision], even though it affects their rules of practice."

Thus, both *Ullmann* and *Adams* rest on the rationale that, as long as Congress is acting within the scope of its constitutional authority, it may impose such restrictions "on the exercise of state power" as are "necessary and proper" "for the more effective exercise of conceded federal power." That *Ullmann* does not rest on the particular paramountcy of the defense power is further indicated by the Court's citation in *Ullmann* (p. 436) of *Brown* v. *Walker*, 161 U.S. 591, 606–607, which "upheld a similar restriction on state court jurisdiction" based on the commerce power. It also cited *Hines* v. *Davidowitz*, 312 U.S. 52, which involved the Congressional power over foreign affairs, including the treaty power, which is one of the constitutional bases of federal narcotic legislation (see *infra*, pp. 21–22).

Federal narcotic legislation rests on just as clearly "conceded federal power" (*Ullmann, supra*, at 436) as the national security legislation involved in *Ullmann*.[5] Contrary to petitioner's apparent suggestion (Br. 15), it does not rest solely on the taxing power, but also on the commerce and the treaty powers. Indeed, the power to control imports—a matter of exclusive and explicit federal authority—is the basic pillar of all federal narcotic legislation.

The first federal statute in this field, the Opium Exclusion Act of 1909 (35 Stat. 614), was sustained

[5] The constitutionality of federal narcotic legislation is well settled. *Brolan* v. *United States*, 236 U.S. 216, 218–220; *United States* v. *Doremus*, 249 U.S. 86; *Yee Hem* v. *United States*, 268 U.S. 178; *Alston* v. *United States*, 274 U.S. 289; *Nigro* v. *United States*, 276 U.S. 332; *United States* v. *Sanchez*, 340 U.S. 42.

as a valid exercise of the "plenary" power of Congress to exclude "merchandise brought from foreign countries." *Brolan* v. *United States*, 236 U.S. 216, 218, quoting *Buttfield* v. *Stranahan*, 192 U.S. 470, 492. Control of narcotics at the point of entry into the United States is so crucial to the entire federal system of regulation that for many years Congress has provided that the mere possession of narcotics creates a presumption that they have been illegally imported—a presumption which this Court upheld 35 years ago (*Yee Hem* v. *United States*, 268 U.S. 178) and to which it has frequently referred (*e.g.*, *Roviaro* v. *United States*, 353 U.S. 53, 63; *Harris* v. *United States*, 359 U.S. 19, 23). Recent Congressional investigations of the narcotic traffic have similarly emphasized the problem of the widespread smuggling of illicit drugs into the United States (S. Rep. No. 1997, 84th Cong., 2d Sess., pp. 3–6).

Moreover, even the statutes enacted under the taxing power (the Harrison Narcotic Act of 1914, 38 Stat. 785, and its successors) were designed to implement United States treaty commitments to control international traffic in narcotics. From 1910 on, a bill imposing a tax on and regulating narcotic drugs within the United States had been urged upon Congress as a necessary step in the participation of the United States in the international drug agreements (S. Doc. No. 157, 63d Cong., 1st Sess., p. 87). And the enactment of the 1914 legislation had been preceded by a vigorous message from the President (H. Doc. No. 33, 63d Cong., 1st Sess.) pointing out that,

while other nations had supplemented the international prohibitions with domestic legislation, the United States had taken no measures for internal control of drugs.[*]

Control of narcotics is thus fundamentally a federal problem, and requires action on the national level to deal with it effectively. See *infra*, pp. 23–25. For without the federal law prohibiting the importation of unlicensed narcotics—a law which, we repeat, rests on the exclusive power of Congress over foreign commerce—adequate regulation would be virtually impossible. In these circumstances, no valid distinction can be made between *Ullmann* and this case based on the fact that *Ullmann* involved national defense and this case involves narcotics.

2. The issue here, therefore, is whether the grant of state immunity in Section 1406 is "necessary and proper for carrying into Execution" the broad Congressional authority over narcotics. As this Court long ago recognized, and as the legislative history of the Narcotic Control Act of 1956 shows, the ease with which narcotics can be concealed and the clandestine character of the traffic make it essential that there be effective enforcement powers. Section 1406, which "reflects a congressional policy to increase the possibility of more complete and open disclosure by removal of fear of state prosecution" (*Ullmann, supra*, at 436), is an appropriate implementation of federal power in this field.

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[*] *Stutz v. Bureau of Narcotics*, 56 F. Supp. 810 (N.D. Calif.), sustained the constitutionality of the Opium Poppy Control Act of 1942 (21 U.S.C. 188, *et seq.*) as a valid implementation of the treaty power.

More than 30 years ago, this Court, in upholding the constitutionality of certain provisions of the Harrison Narcotic Act, pointed out that since the "importation, preparation and sale of the opiate, or other like drugs, and their transportation and concealment in small packages, are exceedingly easy and make the levy and collection of a tax thereon correspondingly difficult * * * to be efficient, a law for taxing it needs to make thorough provision for preventing and discovering evasion * * *" (*Nigro* v. *United States*, 276 U.S. 332, 343–344). Similarly, a Senate Judiciary Subcommittee, after an extensive investigation of "the narcotics problem in the United States, including ways and means of improving the Federal Criminal Code and other laws and enforcement procedures dealing with the possession, sale, and transportation of narcotics, marihuana, and similar drugs" (S. Res. 67, 84th Cong., 1st Sess.), recently reported that "big time traffickers in illicit narcotics are seldom caught and convicted, because they avoid all direct contact with the peddlers and ultimate buyers" (S. Rep. No. 1440, 84th Cong., 2d Sess., p. 7). The subcommittee concluded (*id.*, p. 2) that "[n]arcotic addiction and traffic in illicit drugs is one of the most serious problems facing the United States today"; that because of the "enormous profits" in such traffic, "Federal penalties are not sufficiently severe to deter unscrupulous persons from engaging in the traffic" (*id.*, pp. 5–6); and that it "hoped" that its investigation, together with that being conducted by a House subcommittee, "will result in the enactment of legislation and provide the basis for

appropriations necessary to remove the illicit narcotics cancer from our society" (*id.*, p. 9).

After its own investigation, a House subcommittee reached similar conclusions with respect to the seriousness of the problem and the need for legislation. H. Rep. No. 2388, 84th Cong., 2d Sess., pp. 50–75. The result was the Narcotic Control Act of 1956. The immunity provision of that statute was one of several devices designed to strengthen the enforcement of federal narcotic laws.

Separate bills were introduced in, and passed by, the Senate and then the House (S. 3760, H.R. 11619, 84th Cong., 2nd Sess.). Only the House bill contained the immunity provision.[7] It was one of several provisions that the House committee recommended in order "to permit enforcement officers to operate more effectively" (H. Rep. No. 2388, 84th Cong., 2d Sess., p. 10). In addition to providing "a statutory method to grant immunity to witnesses in cases involving a violation of the narcotic or marihuana laws" (*ibid.*), the House bill also authorized federal narcotic agents to carry firearms and to arrest with-

[7] During the House investigation, two witnesses (James C. Ryan, the Treasury Department's District Supervisor of Narcotics in New York, and Robert Tieken, the United States Attorney for the Northern District of Illinois), had recommended in general terms the granting of immunity in narcotic cases. Neither referred to the scope of such immunity. Hearings before a Subcommittee of the House Committee on Ways and Means, 84th Cong., on *Traffic In, and Control of, Narcotics, Etc.*, pp. 487, 1058, 1059. Mr. Tieken made a similar recommendation before the Senate investigation. Hearings before the Subcommittee of the Senate Judiciary Committee, 84th Cong., 1st Sess., on *Illicit Narcotics Traffic*, pp. 4285, 4342.

out a warrant, expanded the venue provisions for narcotic offenses, authorized the issuance of search warrants at night, and gave the United States the right of appeal from court orders returning seized property or suppressing evidence in narcotic cases. In conference, the latter two provisions, as well as the immunity provision, were adopted. The conference report stated (H. Rep. No. 2546, 84th Cong., 2d Sess., p. 17) that Section 1046 "provided a statutory method of granting immunity to a witness whose testimony is deemed necessary to the public interest by the United States attorney and the Attorney General, in any case involving a violation of specified Federal laws relating to narcotic drugs and marihuana."

In these circumstances, we submit that the grant of immunity from state prosecutions in 18 U.S.C. 1406 is no less "necessary and proper for carrying into Execution" the "conceded federal power" (*Ullmann* v. *United States, supra,* 350 U.S. at 436) over narcotics than the similar grant of state immunity in internal security cases sustained in *Ullmann*. Here, as in *Ullmann,* the federal authority to grant state immunity does not involve any broad-scale or general supersession of state law. State immunity is conferred only in those particular cases where the Attorney General and the United States Attorney determine that the testimony of a particular witness is "necessary to the public interest," and that he should therefore be immunized from state prosecution in order to enable the Federal Government to obtain evidence that would be

otherwise unavailable. As might be expected, such power has been sparingly exercised.[8]

3. Despite the extensive federal narcotic legislation, the states, of course, still retain substantial authority in this field. Indeed, the 1956 Act strengthened Section 8 of the Act of June 14, 1930 (46 Stat. 587, 21 U.S.C. 198), which directed the Secretary of the Treasury to "cooperate with the several States in the suppression of the abuse of narcotic drugs in their respective jurisdictions * * *." See H. Rep. No. 2546, 84th Cong., 2d Sess., p. 18. And, to the extent that such state regulation does not conflict with federal authority, it remains valid. *Whipple* v. *Martinson*, 256 U.S. 41.[9]

But the existence of this authority in the states does not invalidate federal legislation constituting an appropriate implementation of Congressional power. For, as this Court pointed out in sustaining the Harrison Narcotic Act of 1914 as a valid exercise of the taxing power, such power is not improperly exercised because "the same business may be regulated by the

[8] The Department of Justice does not maintain separate statistical records showing the number of times immunity has been conferred under Section 1406. However, examination of other Departmental records indicates that, between the effective date of the Act (July 19, 1956) and August 1, 1960, immunity thereunder has been conferred upon thirteen witnesses. There have been five other witnesses for whom the Attorney General authorized the grant of immunity, but to whom immunity was not thereafter granted.

[9] In this case, however, much of the testimony sought to be compelled from petitioner related to the illegal importation of narcotics (R. 2–7). This is a matter within the exclusive jurisdiction of the Federal Government, and not subject to concurrent jurisdiction by the states. See *supra*, pp. 20–21.

police power of the State," or "because its effect may be to accomplish another purpose as well as the raising of revenue. If the legislation is within the taxing authority of Congress—that is sufficient to sustain it." *United States* v. *Doremus*, 249 U.S. 86, 94. Accord: *United States* v. *Sanchez*, 340 U.S. 42, 44–45.[10] And,

[10] Petitioner relies heavily (Br. 12–13) upon *Tedesco* v. *United States*, 255 F. 2d 35, 39 (C.A. 6), where, in upholding a contempt conviction under 18 U.S.C. 1406, the court expressed "grave doubt that power resides with the Congress to grant immunity from prosecution in state courts pursuant to state narcotic laws * * *." The court based that statement on the fact that "both state and federal authorities have historically exercised concurrent jurisdiction in narcotic matters." But, as pointed out in the text of this brief, this fact does not invalidate the otherwise valid exercise of federal power here involved. Moreover, control over imports is within the exclusive jurisdiction of the Federal Government, and such control is one of the principal bases of federal narcotic legislation (see *supra*, pp. 20–21). Finally, the statement in *Tedesco* is dictum, since the court went on to hold (255 F. 2d at 39) that it "need not consider the point" because the contempt conviction could be affirmed on the alternative ground that the Federal Government may compel testimony by granting complete immunity from federal prosecution. See *infra*, pp. 28–33.

Petitioner also contends (Br. 16–17) that Congress, when it limited the immunity conferred in the Mann Act of 1910 to prosecution, penalty, or forfeiture "under any law of the United States," "recognized its inability to grant immunity with regard to police matters traditionally administered by the respective states." There is nothing in the legislative history, however, to indicate that this was the reason for that limitation. The immunity was granted only for reports required to be filed by persons harboring alien prostitutes. While such harboring was not then prohibited by federal law (*Keller* v. *United States*, 213 U.S. 138), Congress intended to make such harboring "practically impossible" by making those reports available to state authorities for use in state prosecutions (H. Rep. No. 47, 61st Cong., 2d Sess., p. 11; S. Rep.

once it be established that the federal legislation is within the power of Congress (as is the case here), it is the "supreme Law of the Land" to which any inconsistent state law must bow. See *Adams* v. *Maryland*, 347 U.S. 179, 183.

II

ASSUMING ARGUENDO THAT THE ACT PROVIDES IMMUNITY ONLY FROM FEDERAL PROSECUTION, IT IS NEVERTHELESS CONSTITUTIONAL

In Point I, we have argued that the judgment below can be sustained upon the ground that 18 U.S.C. 1406 constitutionally confers immunity from both state and federal prosecution. However, if the Court should disagree and hold either that the immunity does not cover state proceedings or that the grant of the state immunity is beyond the power of Congress,[11] it would then have to consider petitioner's contention (Pet. 19–36) that the Court should overrule *United States* v. *Murdock*, 284 U.S. 141, and adopt the rule that the Federal Government can compel incriminating testimony only by conferring immunity from both state and federal prosecution.

No. 886, 61st Cong., 2d Sess., p. 12.) The limited federal immunity was given to insure that persons in the District of Columbia or federal territories who filed such reports would not be prosecuted on account thereof under federal laws governing the District and territories. 45 Cong. Rec. 805, 807, 1036.

[11] Were it to hold the latter, we submit that under the broad separability provision of the Narcotic Control Act of 1956 (70 Stat. 576, 18 U.S.C. 1401, note), the immunity provision would continue in effect even though limited to federal prosecutions. *Tedesco* v. *United States*, 255 F. 2d 35, 39–40 (C.A. 6); *United States* v. *Curcio*, 278 F. 2d 95, 97 (C.A. 3).

We submit that the unanimous decision in *Murdock* is correct, and that, if the Court finds it necessary to reach the question, it should reaffirm *Murdock*.

The question in *Murdock* was whether a taxpayer was justified in refusing to furnish information to a federal official during an investigation under the internal revenue laws, where he claimed self-incrimination based on possible "violation of a state law and not the violation of a federal law" (284 U.S. at 148). The Court held that he was not. It stated (p. 149) that, under the Supremacy Clause of the Constitution, "[i]nvestigations for federal purposes may not be prevented by matters depending upon state law"; that the "English rule of evidence against compulsory self-incrimination, on which historically that contained in the Fifth Amendment rests, does not protect witnesses against disclosing offenses in violation of the laws of another country"; and that

> This court has held that *immunity against state prosecution is not essential to the validity of federal statutes declaring that a witness shall not be excused from giving evidence on the ground that it will incriminate him,* and also that the lack of state power to give witnesses protection against federal prosecution does not defeat a state immunity statute. The principle established is that *full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination. Counselman* v. *Hitchcock,* 142 U.S. 547. *Brown* v. *Walker,* 161 U.S. 591, 606. *Jack* v. *Kansas,* 199 U.S.

372, 381. *Hale* v. *Henkel*, 201 U.S. 43, 68. [Emphasis added.] [12]

This Court has twice reiterated this basic rationale of *Murdock*, that the Fifth Amendment was intended to protect a witness only against self-incrimination under federal law. In *Feldman* v. *United States*, 322 U.S. 487, the Court referred to the "basic principles of our federation" (p. 489) that the Fourth and Fifth "Amendments protect only against invasion of civil liberties by the Government whose conduct they alone limit" (p. 490); and it quoted (pp. 491–492), with apparent approval, the language from *Murdock* set forth in the foregoing indented paragraph. More recently, in *Knapp* v. *Schweitzer*, 357 U.S. 371, 380, the Court stated:

> The sole—although deeply valuable—purpose of the Fifth Amendment privilege against self-incrimination is the security of the individual against the exertion of the power of the Federal Government to compel incriminating testimony with a view to enabling that same Government to convict a man out of his own mouth.

Petitioner, relying upon criticism of *Murdock* by Professor Grant (Br. 20, n. 18; 22–23), urges that the Court in *Murdock* misinterpreted two English cases upon which it relied. But petitioner overlooks the fact that there were other, and we believe more im-

[12] In the light of this holding in *Murdock*, the contrary ruling in the early case of *United States* v. *Saline Bank*, 1 Pet. 100, and the contrary dictum in *Ballman* v *Fagin*, 200 U.S. 186, 195, upon which petitioner relies (Br. 24–26), can no longer be deemed authoritative. Both cases were called to the Court's attention in *Murdock* (284 U.S. at 143, 145).

portant, bases for the holding in *Murdock*. The Court's ultimate conclusion that "full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination" (284 U.S. at 149) directly rested on four leading cases: *Counselman* v. *Hitchcock*, 142 U.S. 547; *Brown* v. *Walker*, 161 U.S. 591; *Jack* v. *Kansas*, 199 U.S. 372; and *Hale* v. *Henkel*, 201 U.S. 43.[13] The Court also cited the Supremacy Clause as authority for its statement that "[i]nvestigations for federal purposes may not be prevented by matters depending upon state law." Finally, the Court had called to its attention the views of Professor Wigmore (284 U.S. at 143), who, although recognizing a division of authority upon whether the privilege was applicable where the danger of prosecution was under the laws of another jurisdiction, concluded that strong policy considerations dictated a negative answer (see Wigmore, *Evidence* (2d ed. 1923), §§ 2251, 2258).

Petitioner emphasizes (Br. 30–32) that Michigan and certain other states have adopted the rule that the state cannot compel testimony that might incriminate the witness under federal law. This rule, however, involves only the interpretation of state constitutional

[13] In *Brown* v. *Walker*, *supra*, this Court stated (161 U.S. at 608) that possible prosecution in a state court did not render the grant of immunity from federal prosecution inadequate to compel incriminating testimony, since it "was never the object of the [federal] provision [against self-incrimination] to obviate" the danger that the witness "might be subjected to the criminal laws of some other sovereignty."

and statutory provisions, and is not applicable to the federal privilege against self-incrimination. For "[t]he state statute could not, of course, prevent a prosecution of the same party under the United States statute, and it could not prevent the testimony given by the party in the State proceeding from being used against the same person in a Federal court for a violation of the Federal statute" (*Jack* v. *Kansas*, 199 U.S. 372, 380). And, in *Knapp* v. *Schweitzer*, *supra*, the Court rejected the contention that the State of New York violated a witness's privilege against self-incrimination under the Fifth Amendment by compelling him to testify upon the grant of immunity from state, but not from federal, prosecution.

The short of the matter is that a grant of immunity from federal prosecution is coextensive with the Fifth Amendment privilege against self-incrimination because that privilege only protects against incrimination under federal, but not under state, law. For the federal and the state governments are each supreme in their own areas, and "investigations for federal purposes may not be prevented by matters depending upon state law" (*United States* v. *Murdock*, 284 U.S. 141, 149). As was stated in *Knapp* v. *Schweitzer*, 357 U.S. 371, 380–381:

> This Court with all its shifting membership has repeatedly found occasion to say that whatever inconveniences and embarrassments may be involved, they are the price we pay for our federalism, for having our people amenable to—as well as served and protected by—two governments. If a person may, through im-

> munized self-disclosure before a law-enforcing agency of the State, facilitate to some extent his amenability to federal process, or *vice versa*, this too is a price to be paid for our federalism. Against it must be put what would be a greater price, that of sterilizing the power of both governments by not recognizing the autonomy of each within its proper sphere.

The basic challenge to *Murdock*—that it is unfair to permit the states to prosecute for crimes disclosed in testimony compelled by the Federal Government—can be dealt with, if appropriate, by reciprocal federal and state legislation. See the suggestion of the National Conference of Commissioners on Uniform State Laws, 9C Uniform Laws Annot. 194–195. This claim of unfairness, however, is not a valid basis for extending the federal constitutional privilege to cover possible prosecution under state law—an area that it was never intended to reach.

III

PETITIONER'S OTHER ATTACKS UPON HIS CONTEMPT CONVICTION ARE WITHOUT MERIT

In addition to challenging the constitutionality of 18 U.S.C. 1406 under the Fifth Amendment, petitioner attacks his contempt conviction on three other grounds. He contends (1) that the immunity granted was inadequate because the Government did not give him a pardon for a prior narcotic conviction for which he was then serving his sentence (Br. 37–48); (2) that the trial court should have advised him of the extent of the immunity he received under the Act (Br. 48); and (3) that the sentence of two years' imprisonment

was excessive (Br. 49). None of these contentions is valid.

A. THE GOVERNMENT WAS NOT REQUIRED, AS A CONDITION TO REQUIRING PETITIONER TO TESTIFY PURSUANT TO THE GRANT OF IMMUNITY, TO PARDON HIM FOR A PRIOR NARCOTIC CONVICTION FOR WHICH HE WAS THEN SERVING HIS SENTENCE

When petitioner was directed to testify before the grand jury, he was serving a five-year sentence under a previous conviction for conspiracy to violate the narcotic laws (see *supra,* p. 4). Relying on some general statements in *Brown* v. *Walker,* 161 U.S. 591, 601–602, where this Court, in sustaining the constitutionality of an earlier immunity statute, likened it to an amnesty statute, petitioner urges (Br. 37, see Br. 46) that he was entitled to a "general pardon or amnesty" covering the unserved portion of his imprisonment and his fine before he could be compelled to testify. He cites no authority for what the court of appeals properly characterized (R. 39, 40) as a "fantastic" and "extraordinary" contention.

Section 1406 provides that no witness compelled to testify thereunder "shall be" prosecuted or subjected to penalty or forfeiture as a result thereof. Petitioner is thus fully protected against any future prosecution for matters disclosed in his compelled testimony. No more is required to make the immunity coextensive with the privilege. "The design of the constitutional privilege is * * * to protect [the witness] against being compelled to furnish evidence to convict him of a criminal charge" (*Brown* v. *Walker,* 161 U.S. 591, 605; see *People ex. rel. Hunt* v. *Lane,* 116 N.Y.S. 990, 993–994, affirmed, 196 N.Y. 520; *Peo-*

ple v. *Fine*, 19 N.Y.S. 2d 275, 278–282), *i.e.*, to protect against future prosecution. As petitioner himself recognizes (Br. 38), the privilege was never intended to, and does not, exonerate for past convictions. The irrelevant fact, relied upon by petitioner (Br. 38, 46), that the earlier conviction was for conspiracy affords no basis for an exception to this settled principle.

B. PETITIONER'S CONVICTION OF CONTEMPT WAS NOT RENDERED INVALID BY THE FACT THAT THE TRIAL COURT DID NOT ADVISE HIM OF THE EXTENT OF THE IMMUNITY UNDER THE ACT

Upon holding petitioner in contempt, the court sentenced him to imprisonment for two years, to commence at the expiration of the sentence he was then serving (R. 34). However, recognizing that petitioner's refusal to answer the questions "when first addressed to him may have been a procedural device to secure a determination of the issue of law which he presented", the court provided that if within 60 days petitioner "purge[s] himself of his contempt by answering the questions which have been addressed to him by the Grand Jury * * * the sentence imposed herein will be vacated" (R. 34–37).

We construe the foregoing sixty-day-purge period as running from the date of final judicial disposition of this case, including the action of this Court. Petitioner plainly can suffer no prejudice from the fact that the trial court did not advise him of the extent of the immunity conferred by Section 1406. For if this Court upholds petitioner's conviction, either on the ground that he was given state immunity or that

he was required to answer because of the immunity from federal prosecution, petitioner will then have ample time within which to make an informed choice between answering the questions or going to jail.

But even if, contrary to our view, the purge period should be deemed to have expired 60 days after entry of the district court's judgment, petitioner's refusal to testify was nevertheless contemptuous. Petitioner was represented by counsel in the contempt proceedings, and it was the function of counsel, not of the court, to advise him as to his immunity. The scope of the immunity was fixed by Congress, and nothing said or done by the court could change it. The court in no way misled petitioner as to the scope of his immunity (cf. *Raley* v. *Ohio*, 360 U.S. 423), and petitioner did not request advice from the court on that issue. In these circumstances, the court was not required to explain to petitioner, prior to directing him to answer, its view as to the scope of his immunity.

C. THE SENTENCE WAS NOT EXCESSIVE

Finally, petitioner contends that his sentence of two years' imprisonment is excessive, apparently because he was then serving a five-year sentence for a prior narcotic conviction. But the two sentences were for entirely different offenses. The prior sentence was for conspiracy to violate the narcotic laws, and the instant sentence was for the contemptuous refusal to give testimony as directed by the court. The court gave petitioner two opportunities to be heard before sentence was imposed (R. 28, 34–35), and also gave him 60 days to purge himself by

answering the questions. In these circumstances, we submit that the sentence of two years' imprisonment was not an abuse of the district court's discretion. Cf. *Brown* v. *United States*, 359 U.S. 41, 52. Comparable sentences have been imposed and upheld in other narcotic contempt cases based on refusal to testify following the grant of immunity under 18 U.S.C. 1406. *Tedesco* v. *United States*, 255 F. 2d 35 (C.A. 6) (two years); *United States* v. *Curcio*, 278 F. 2d 95 (C.A. 3) (two years); *Corona* v. *United States*, 250 F. 2d 578 (C.A. 6), certiorari denied, 356 U.S. 954 (two years); *United States* v. *Pagano*, 171 F. Supp. 435 (S.D. N.Y.) (18 months).[14]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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SEPTEMBER 1960.

[14] The length of sentence does not appear in the *Curcio*, *Corona* or *Pagano* opinions. The information was obtained from the records of the Department of Justice.

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SUPREME COURT OF THE UNITED STATES

No. 29.—October Term, 1960.

Giacomo Reina, Petitioner, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[December 19, 1960.]

Mr. Justice Brennan delivered the opinion of the Court.

The Narcotic Control Act of 1956,[1] 18 U. S. C. § 1406, legislates immunity from prosecution for a witness compelled under the section by court order to testify before a federal grand jury investigating alleged violations of the federal narcotics laws. The questions presented are, primarily, whether the section grants immunity from state, as well as federal, prosecution, and, if state immunity, whether the section is constitutional.

[1] Act of July 18, 1956, 70 Stat. 572 *et seq.*; 18 U. S. C. § 1406 *et seq.* The relevant portions of § 1406 are as follows:

"§ 1406. Immunity of witnesses.

"Whenever in the judgment of a United States Attorney the testimony of any witness . . . in any case or proceeding before any grand jury or court of the United States involving any violation of [certain federal narcotics statutes] is necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify . . . But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify . . . nor shall testimony so compelled be used as evidence in any criminal proceeding . . . against him in any court . . ."

The petitioner was serving a five-year sentence for a federal narcotics offense [2] when, on December 5, 1958, he was subpoenaed before a federal grand jury sitting in the Southern District of New York. A number of questions were asked him concerning his crime, particularly as to the persons involved with him and their activities in the smuggling of narcotics into this country from Europe. The petitioner invoked the provision of the Fifth Amendment against being compelled to be a witness against himself [3] and refused to answer any of the questions. The United States Attorney with the approval of the Attorney General obtained a court order pursuant to § 1406 directing him to answer. When he returned before the grand jury he again refused to testify. Proceedings against him in criminal contempt resulted in the judgment under review adjudging him guilty as charged. 170 F. Supp. 592. The Court of Appeals for the Second Circuit affirmed. 273 F. 2d 234. Because of the importance of the questions of the construction and constitutionality of § 1406 raised by the case, we granted certiorari. 362 U. S. 939.

Petitioner's main argument in both courts below and here challenges § 1406 as granting him only federal immunity, and not state immunity, either because Congress meant the statute to be thus limited, or because the statute, if construed also to grant state immunity, would be unconstitutional. Both courts below passed the question whether the statute grants state immunity because, assuming only federal immunity is granted, they held that *United States* v. *Murdock*, 284 U. S. 141, settled that the Fifth Amendment does not protect a federal wit-

[2] *United States* v. *Reina*, 242 F. 2d 302. When petitioner appeared before the grand jury on December 5, 1958, he had served about two years and eight months of his five-year term. He completed the sentence on November 21, 1959.

[3] "No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

ness from answering questions which might incriminate him under state law. 170 F. Supp., at 595; 273 F. 2d, at 235.' Petitioner contends that *Murdock* should be re-examined and overruled. We have no occasion to consider this contention, since in our view § 1406 constitutionally grants immunity from both federal and state prosecutions.

We consider first whether the immunity provided by § 1406 covers state, as well as federal, prosecutions. We have no doubt the section legislates immunity from both. The relevant words of the section have appeared in other immunity statutes and have been construed by this Court to cover both state and federal immunity. In *Adams* v. *Maryland*, 347 U. S. 179, a like provision in 18 U. S. C. § 3486 that the compelled testimony shall not "be used as evidence in *any* criminal proceedings . . . against him in *any* court" was held to cover both federal and state courts. [Emphasis supplied.] "The language could be no plainer," p. 181. In *Ullmann* v. *United States*, 350 U. S. 422, 434–435, 18 U. S. C. § 3486 (c), added by the Immunity Act of 1954, of which § 1406 is virtually a carbon copy, was given the same construction. Moreover, the adoption of § 1406 followed close upon the *Ullmann* decision. That decision came down on March 26, 1956. Section 1406 was reported out of the House Ways and Means Committee only three months later on June 19, 1956, H. R. Rep. No. 2388, 84th Cong., 2d Sess. It became law on July 18, 1956. 70 Stat. 574. We cannot believe that Congress would have used in § 1406 the very words construed in *Ullmann* to cover both state and federal prosecutions without giving the words the same meaning.

We turn then to the petitioner's argument that, so construed, § 1406 encroaches on the police powers reserved to the States under the Tenth Amendment. The petitioner recognizes that in *Ullmann* the Court upheld the authority of Congress to grant state immunity as "neces-

sary and proper" to carry out the power to provide for the national defense; and in *Adams* v. *Maryland* upheld the power of Congress to preclude the States from using testimony that was compelled under former § 3486 before a congressional investigating committee. He insists, however, that the congressional authority to enact narcotics laws—rested on the Commerce Clause, *Brolan* v. *United States*, 236 U. S. 216, 218; *Yee Hem* v. *United States*, 268 U. S. 178; or the taxing power, *United States* v. *Doremus*, 249 U. S. 86; *Alston* v. *United States*, 274 U. S. 289; *Nigro* v. *United States*, 276 U. S. 332, 351–354; *United States* v. *Sanchez*, 340 U. S. 42—is not broad enough to encompass the legislation of immunity against state prosecution under state narcotics laws, "a subject that has traditionally been within the police power of the states." But the petitioner misconceives the reach of the principle applied in *Ullmann* and *Adams* v. *Maryland*. Congress may legislate immunity restricting the exercise of state power to the extent necessary and proper for the more effective exercise of a granted power, and distinctions based upon the particular granted power concerned have no support in the Constitution. See *Brown* v. *Walker*, 161 U. S. 591, in which the Court upheld a federal immunity statute passed in the name of the Commerce Clause and construed that statute to apply to state prosecutions. The relevant inquiry here is thus simply whether the legislated state immunity is necessary and proper to the more effective enforcement of the undoubted power to enact the narcotics laws.

It can hardly be questioned that Congress had a rational basis for supposing that the grant of state as well as federal immunity would aid in the detection of violations and hence the more effective enforcement of the narcotics laws. The Congress has evinced serious and continuing concern over the alarming proportions to which the illicit narcotics traffic has grown. The traffic has far-reaching

national and international roots. See S. Rep. No. 1997, 84th Cong., 2d Sess., pp. 3–6. The discovery and apprehension of those engaged in it present particularly difficult problems of law enforcement. The whole array of aids adopted in 1956, of which immunity is but one, was especially designed to "permit enforcement officers to operate more effectively." H. R. Rep. No. 2388, 84th Cong., 2d Sess., p. 10. The grant of both federal and state immunity is appropriate and conducive to that end, and that is enough. Even if the grant of immunity were viewed as not absolutely necessary to the execution of the congressional design, "[T]o undertake here to inquire into the degree of . . . necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground." *McCulloch* v. *Maryland*, 4 Wheat. 316, 423. And the supersession of state prosecution is not the less valid because the States have traditionally regulated the traffic in narcotics, although that fact has troubled one court. See *Tedesco* v. *United States*, 255 F. 2d 35. Madison said, "Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws or even the Constitutions of the States." II Annals of Cong. 1897 (1791). Or as the Court has said concerning federal immunity statutes, ". . . Since Congress in the legitimate exercise of its powers enacts 'the Supreme law of the land,' state courts are bound by [§ 1406], even though it affects their rules of practice." *Adams* v. *Maryland*, *supra*, p. 183.

The petitioner urges that in any event he should not have been ordered to answer the grand jury's questions unless he first received a "general pardon or amnesty" covering the unserved portion of his sentence and his fine. This is a suprising contention, in light of the traditional

purpose of immunity statutes to protect witnesses only as to the future. It suggests that the witness who has been convicted is entitled to ask more of the Government than the witness who has not but may be compelled under § 1406 to reveal criminal conduct which, but for the immunity, would subject him to future federal or state prosecution. Yet the petitioner on his brief says that "the ordinary rule is that once a person is convicted of a crime, he no longer has the privilege against self-incrimination as he can no longer be incriminated by his testimony about said crime . . . ." There is indeed weighty authority for that proposition. *United States* v. *Romero*, 249 F. 2d 371; 8 Wigmore, Evidence (3d ed. 1940), § 2279; cf. *Brown* v. *Walker*, *supra*, 597–600. Under it, immunity, at least from federal prosecution, need not have been offered the petitioner at all.

The petitioner does not argue that remission of his penalty was his due as a *quid pro quo* for further exposing himself to personal disgrace or opprobrium. That reason would not be tenable under *Brown* v. *Walker*, *supra*, in which the Court rejected the argument that the validity of an immunity statute should depend upon whether it shields "the witness from the personal disgrace or opprobrium attached to the disclosure of his crime." 161 U. S. 605–606. Nor does he support his contention with the argument that the prison sentence imposed for disobedience of the order directing him to testify is actually an additional punishment for his crime. His argument is the single one that "the said order was not a proper basis upon which to bottom a contempt proceeding in the face of a claim of privilege against self-incrimination *as it did not grant this petitioner immunity co-extensive with the constitutional privilege it sought to replace* . . . ." The complete answer to this is that in safeguarding him against future federal and state prosecution "for or on account of any transaction, matter or thing concerning which he

is compelled" to testify, the statute grants him immunity fully coextensive with the constitutional privilege. Some language in *Brown* v. *Walker*, 161 U. S., at 601, to which petitioner refers, compares immunity statutes to the traditional declarations of amnesty or pardon. But neither in that opinion nor elsewhere is it suggested that immunity statutes, to escape invalidity under the Fifth Amendment, need do more than protect a witness from future prosecutions. This § 1406 does.

The petitioner complains finally that his sentence is excessive. The District Court sentenced him to two years' imprisonment to commence at the expiration of the sentence he was then serving. However, the court also allowed the petitioner 60 days from the date of the judgment to purge himself of his contempt by appearing within that period before the grand jury and answering the questions. It was further provided that if he did so, "The sentence herein shall be vacated." The District Court took this action because it found in effect that the petitioner asserted his legal position in good faith and was not contumaciously disrespectful of the court's order or obstinately flouting it. 170 F. Supp. 596. There is no occasion for us to consider the claim of excessiveness of the sentence, or the petitioner's companion claim that the conviction was invalid because the District Court did not advise him of the extent of the immunity conferred by § 1406. We construe the 60-day purge period as running from the effective date of this Court's mandate and the petitioner may avoid imprisonment by answering. Now that this Court has held that his fears of future state or federal prosecution are groundless, he knows that the only reason he gave for claiming his privilege has no substance. No question of an admixture of civil and criminal contempt having been raised below or here, we do not reach the issues it might present.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 29.—October Term, 1960.

Giacomo Reina, Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[December 19, 1960.]

Mr. Justice Black, with whom The Chief Justice concurs, dissenting.

The Court affirms a conviction for contempt of court upon which petitioner has been sentenced to imprisonment for two years with the provision that he can purge himself of the contempt if he answers the questions propounded to him within 60 days. This is a strange kind of sentence, apparently combining in one judgment the elements of both civil and criminal contempt. This fact alone is sufficient to arouse grave doubts in my mind as to the validity of the judgment, for the history of civil contempt and criminal contempt are quite different and call for the exercise of quite different judicial powers. Moreover, analysis of this judgment makes it clear that it rests upon the notion that petitioner has as yet committed no crime and is being sentenced for civil contempt for the sole purpose of coercing his compliance with the demand for his testimony, but that if he fails to comply with this demand within the specified period, he *will have* committed a criminal contempt. Thus the judgment seems to represent a present adjudication of guilt for a crime to be committed in the future. The fact that the judgment has not been challenged on this specific ground by petitioner does not, in my view, bar our consideration of it. Ordinarily, a judgment invalid on its face can be challenged at any time. I find it unnecessary,

however, to reach a definite conclusion on this question because, even assuming that the judgment is not invalid as a result of its hybrid nature, I still think it should be reversed.

Petitioner contends that the decision of the Court of Appeals should be reversed because the two-year sentence is excessive. That contention is sufficient to bring into issue any ground upon which the length of the sentence may open the decision to attack. Cf. *Boynton* v. *Virginia*, — U. S. —, —. I think the imposition of a two-year sentence was beyond the District Court's power in the summary proceedings it conducted in this case. In my dissenting opinion in *Green* v. *United States*, 356 U. S. 165, 193, I stated in full the reasons which led me to conclude that where the object of a proceeding is to impose punishment rather than merely to coerce compliance, "there is no justification in history, in necessity, or most important in the Constitution for trying those charged with violating a court's decree in a manner wholly different from those accused of disobeying any other mandate of the State." *Id.*, at 218. I adhere to that view and reiterate my belief that the Court's position rests solely upon the fact that "judges and lawyers have told each other the contrary so often that they have come to accept it as the gospel truth." *Id.*, at 219. Thus, I cannot join a decision upholding a two-year sentence for contempt upon a trial in which the accused has been denied the constitutional protections of indictment by a grand jury and determination of guilt by a petit jury. I regard this case as another ominous step in the incredible transformation and growth of the contempt power and in the consequent erosion of constitutional safeguards to the protection of liberty. I see no reason why petitioner should not have been tried in accordance with the law of the land—including the Bill of Rights—and conclude, therefore, that the case should be reversed for such a trial.